5

UNITED STATES DISTRICT COURT

DISTRICT OF DELAWARE

-------------------------------------- X

MAGTEN ASSET MANAGEMENT CORPORATION and

LAW DEBENTURE TRUST COMPANY OF NEW YORK,

Plaintiffs,

-vs-

NORTHWESTERN CORPORATION,

Defendant.

Civil Action No. C.A. No. 04-1494 (JJF)

-------------------------------------- X

MAGTEN ASSET MANAGEMENT CORP.,

Plaintiff,

-vs-

MICHAEL J. HANSON and ERNIE J. KINDT,

Defendants.

Civil Action No. C.S. No. 05-499 (JJF)

-------------------------------------- X

DATE: November 8, 2007

TIME: 9:00 a.m.

Deposition of ROBERT W. BERLINER, held at the offices of Curtis, Mallet-Prevost, Colt & Mosle, 101 Park Avenue, New York, New York,

- ROBERT W. BERLINER -

pursuant to Notice, before Hope Menaker, a Shorthand Reporter and Notary Public of the State of New York.

- ROBERT W. BERLINER -

A. That was in 2005, 2006 and 2007.

Q. Can you explain what you did in 2005?

A. I was a participant in a goodwill analysis with respect to the goodwill of a defendant in a lawsuit.

Q. What did you do?

A. I reviewed various documents and performed some calculations to determine whether or not, and if so, how much the goodwill of the entity had been impaired.

Q. Did you perform a valuation in that assignment?

A. I did not. I don't perform valuations.

Q. Can you explain what you did in 2006?

MR. KAPLAN: Object to the form.

A. In 2006, I consulted with one of my partners with respect to the question of when the goodwill of a particular company was impaired.

Q. What was the nature of that consultation?

A. We were dealing with one of the largest, if not the largest, write-off of goodwill in the history of the United States. And we were endeavoring to determine whether or not such

- ROBERT W. BERLINER -

write-off should have been taken earlier than it was taken.

Q. What was the nature of the work that you did?

A. I consulted with my partner, who was responsible for that engagement, and offered my views.

Q. Your views with respect to what aspect of the goodwill impairment analysis?

A. The timing of the impairment.

Q. Can you explain what you did in 2007 in respect to -- with respect to goodwill impairment?

A. In 2007, I addressed the very same issue in this litigation.

Q. I see. Mr. Berliner, are you accredited by any organization or professional society in business valuation?

A. I am not.

Q. Are you an accredited senior appraiser?

A. No, sir.

Q. Do you have any credentials from the American Institute of CPA accredited in business valuation?

A. I do not.

- ROBERT W. BERLINER -

Q. Do you consider yourself to be an expert in business valuation?

A. I do not.

Q. Have you ever been qualified as an expert in valuation by any court or arbitration tribunal?

A. No, sir.

Q. Have you ever offered any expert testimony regarding business valuation in any proceeding?

MR. KAPLAN: Object to the form.

A. No, sir.

Q. In any of those proceedings in which you have offered an expert opinion, have you ever been the subject of a Daubert motion, if you know?

A. I know what a Daubert motion is. I have been the subject of motions brought to disqualify me as a testifying expert. I don't know whether those motions would have been brought under the so-called -- would qualify as a Daubert motion.

Q. How many times have such motions to disqualify been made to your knowledge?

A. I would say between six and ten times.

Q. Were you ever disqualified as a result

- ROBERT W. BERLINER -

was a similar situation in that the reasons offered for the motion were again that I had a commanding knowledge of the accounting firm's auditing methodology and how they defend themselves in litigation.

Q. Sir, as a CPA, have you ever reviewed valuations or appraisals done by appraisers to determine whether an SFAS 142 goodwill impairment analysis was necessary?

MR. KAPLAN: Object to the form.

A. Yes.

Q. When did you do that?

A. I believe I did it in 2005 and again in connection with this litigation.

Q. Did you perform a valuation in this litigation?

A. I did not.

Q. Let me ask you one question and then maybe we'll take a two-minute break or five-minute break.

Sir, are you familiar with the Uniform Standards of Professional Appraisal Practice?

A. I've learned of them in this case, but I'm not familiar with them.

- ROBERT W. BERLINER -

Q. When did you learn of them in this case?

A. Well, I would have understood there to exist such standards but the first time, I guess, that I saw them in that particular terminology was when I read the expert reports of the experts on behalf of defendants in this case.

Q. So that -- strike that.

Is it, therefore, safe to assume that informing the opinions and in preparing your report, which is Exhibit 1, that you did not refer to or use any of the Uniform Standards of Professional Appraisal Practice?

MR. KAPLAN: Object to the form.

A. It's fair to say that.

MR. PIZZURRO: Maybe take five minutes.

(Whereupon, there was a brief recess in the proceedings.)

Q. Mr. Berliner, you referred to three instances in which you participated in a SFAS 142 impairment analysis.

Do you recall that testimony?

A. Yes.

Q. You referred to years 2005, 2006 and 2007.

- ROBERT W. BERLINER -

A. I do.

Q. Did I misunderstand you earlier when you said that you didn't perform any valuation in this case?

MR. KAPLAN: Object to the form.

A. Yes.

Q. Can you explain to me what you were doing then, in this sentence that we just read?

A. Yes. I was taking the valuation that was performed by American Appraisal and following their methodology, correcting some of the assumptions that they used and some of the data that they based their valuation on based upon my knowledge of the facts of the case.

Q. Sir, do you understand that American -- American Appraisers Association, AAA is a recognized expert in performing business valuations?

A. I do.

MR. KAPLAN: Object to the form.

Q. And you are not; is that correct?

A. That's correct.

Q. Do you know whether in performing the valuation that you criticized AAA followed the

- ROBERT W. BERLINER -

A. Yes.

Q. So, can you explain to me the basis for your testimony that you were performing an analysis of the value of the company as of June 30th when your report says it's as of January 1st?

A. I think for the reason I expressed. I used the January 1st, '02, business enterprise value from the American Appraisal report to come up with a revised value which I could then compare to the carrying value of the goodwill as of June 30th, 2002.

Q. We'll get to that computation in a minute. Right now we're focused on what you did to estimate a business enterprise value as of January 1st, 2002, for Expanets as is in your report.

Now, is it your testimony that the as-of date is January 1st, 2002, or are you changing your report now to say that the as-of date is June 30th, 2002?

MR. KAPLAN: Object to the form.

A. No. It's as stated here, January 1st, '02.

Q. Okay. In revising that valuation, the

- ROBERT W. BERLINER -

A. No. I was not asked to address that. I did not.

Q. Can you explain for us, sir, what the process is for determining an impairment, goodwill impairment under SFAS 142?

A. It's a two-step process. The first step is a comparison of the business enterprise value with the carrying value of the entity. To the extent that the carrying value of the entity exceeds the business enterprise value, step two is invoked.

And under step two, one determines an implied value of goodwill following the methodology of SFAS -- I'm sorry -- APB 16, APB 16 on purchase accounting. Then, one compares the implied value of goodwill to the carrying value of goodwill to determine whether or not goodwill is impaired.

Q. Who performs the business enterprise valuation that's used in step one?

A. In this case, American Appraisal.

Q. Would the auditing firm prepare that valuation?

A. The auditing firm would not because if it did, it would be auditing its own work and would

- ROBERT W. BERLINER -

lose its independence.

Q. So you would bring in a professional appraiser?

A. That's correct.

Q. Presumably the professional appraiser would follow and be bound by the standards of the profession, which are the Uniform Standards of Professional Appraisal Practice?

A. That's correct. And the auditor --

Q. In performing your alternative --

MR. KAPLAN: Let him finish. He was in the middle of an answer.

A. The auditor would be bound by generally accepted auditing standards of which SFAS 73 relates to how the auditor would relate to the outside specialist or appraiser.

Q. So, in -- we've established that in order to perform appropriately a 142 goodwill impairment analysis, you must start with an appropriate business enterprise valuation done by professionals using the standards governing the appraisal profession, correct?

A. Yes.

Q. Now, I think we've also established that

- ROBERT W. BERLINER -

from the accounting firm.

Q. Then what is --

A. From -- the accounting firm then gets it from the company.

Q. What's the role of the accounting firm in this process?

A. The role of the accounting firm is to follow SFAS 73 in satisfying itself as to the assumptions used and the credibility of the appraiser.

Q. And is the role of the accounting firm that has a problem with the valuation or the assumptions to perform an alternative valuation?

MR. KAPLAN: Object to the form.

A. That's one possibility, to engage their own appraiser to perform a valuation to compare to the company's, Northwestern's appraiser.

Q. When you say employ or engage their own, you're talking about another independent American Appraisal type organization?

A. Exactly.

Q. Because the CPAs in the auditing firm are not either qualified nor -- and they would risk their independence if they themselves were to

- ROBERT W. BERLINER -

makes certain adjustments, proposes certain adjustments to those financial statements, that doesn't mean the auditor is preparing the financial statements.

Likewise, the auditor could propose an adjustment to the appraiser's determination of the business enterprise value if the auditor believed that the -- some of the inputs that the client had provided were inaccurate.

They're not overriding the expertise and methodology of the appraiser. They're modifying it, because the appraiser disclaimed responsibility for the data inputted.

So, I think that's a very logical explanation of why I was able to modify the American Appraisal determination of business enterprise value and why I don't believe that in that process I did my own business enterprise valuation.

Q. Do you know of any case where 142 analysis is being done where the auditor modified the appraisal -- the independent appraisal with which it was provided by the expert?

MR. KAPLAN: Object to the form.

- ROBERT W. BERLINER -

A. I'm not aware of those. I mean, we have to review practice.

Q. You have never in a professional capacity been employed by an auditing firm to review an appraisal in connection with a 143 -- sorry, 142 goodwill impairment analysis; is that right?

A. In connection with an audit?

Q. Correct.

A. No, I have not.

Q. I think you testified that you don't believe you did an independent valuation because you simply followed precisely the methodology of American Appraisers; is that correct?

A. Yes. Yes.

Q. With respect to Expanets, American Appraisers also considered a market approach in preparing the valuation; isn't that right?

A. That's correct.

Q. And you did not; is that right?

A. I did not what?

Q. You did not consider the market approach in performing your alternative valuation?

A. I considered the market approach.

- ROBERT W. BERLINER -

Q. And where is it? Is it reflected in your report that you considered the market approach?

A. I considered -- I didn't do a market approach. I didn't attempt to change American Appraisal's market approach because that was something that would have been far more difficult for me to do and would have been very costly and time-consuming. And it was not something that I could do within the time frame that I was given to develop this report.

Secondly, the American Appraisal determination of business enterprise value based on the market approach pretty much coalesced with its determination of business enterprise value under the income approach. And American Appraisal gave equal weight to the two approaches in their opinion.

And, as I understand the valuation of determination of business enterprise value, if done correctly, the income approach and the market approach tend to come up with the similar valuations. It's when the weighting changes, so you need not necessarily, as an appraiser, say

- ROBERT W. BERLINER -

Do you see that, sir?

A. I do.

Q. Do you see the comment under that which reads, "This rule requires the appraiser to use all relevant approaches for which sufficient reliable data are available. However, it does not mean that the appraiser must use all approaches in order to comply with the rule if certain approaches are not applicable."

Do you see that?

A. Yes.

Q. Do you understand that approaches includes the market approach as well as the discounted cash flow approach?

A. I do.

Q. Where in your report does it reflect your consideration of the market approach?

MR. KAPLAN: Object to the form.

A. It doesn't, because I could not recalculate the market approach as I could the income approach; but I believe the market approach was equally flawed as was the income approach.

It seems to me that there is all the more reason, given the circumstances of Expanets,

much lower and the impairment of goodwill would have been recognized at an earlier date.

Q. I take it you don't have an issue with Northwestern's having chosen January 1st, '02, as the effective date of the goodwill impairment analysis.

MR. KAPLAN: Objection to the form.

Q. Is that correct?

A. That was the adoption date. I have no problem with that.

Q. In your view -- strike that.

Would it have helped you to understand what American Appraisers knew -- what verification efforts they had taken if there had been a deposition and an oral examination of somebody from American Appraisers?

MR. KAPLAN: Object to the form.

A. Can I hear that question back, please?

MR. PIZZURRO: Can you read it back?

(The question requested was read back by the reporter.)

MR. KAPLAN: Objection to form.

A. I think so, yes.

Q. Were you ever a party to any discussions

- ROBERT W. BERLINER -

amount of any impairment.

Q. Do you have any experience in conducting a step two of the 142 analysis?

MR. KAPLAN: Objection.

A. I may have gotten into that in the 2005 litigation. I don't recall specifically.

Q. Let me put a finer point on the question.

Do you have any experience with an actual audit situation involving a 142 analysis, step two?

A. No. 142 is a fairly recent vintage, and at this time, my auditing days were long since over before 142 was issued.

Q. So I guess you don't know how long it might have taken to complete the step two of the 142 analysis; is that correct?

MR. KAPLAN: Object.

A. That's correct.

Q. If you had been working for Deloitte & Touche and you had received the valuation, you would have presumably noted the results of the market approach; is that right?

A. Yes.

Then effectively, there is no need for the independent expert who provides the business valuation which is the basis for the 142 impairment analysis; is that correct?

MR. KAPLAN: Objection.

A. No, not at all.

Q. Am I just misunderstanding something? Don't you need to have an independent business enterprise valuation as fundamental and indispensable components of any 142 analysis?

A. Yes. We had one here.

Q. Okay. I'm just trying -- so, there is no basis or ability on the part of either the client or the auditor to disregard or unilaterally amend the work of the independent appraiser whose business enterprise valuation is indispensable to the underlying analysis; is that right?

A. No.

Q. It's not right?

A. No. Let's use an unrealistic example. Let's assume that American Appraisal properly employed the income approach and the market value approach -- the market approach.

The auditor is reviewing their appraisal

- ROBERT W. BERLINER -

A. No. One wouldn't expect that.

Q. Can you look at Attachment A2 to your report? It's right -- sometimes the attachments, it's multiples, but it's right after the series of pages that ends on 2-22. It's under "Attachments" to "Basis for Opinion 2."

Do you have that, sir?

A. I do.

Q. Now, in doing your impairment analysis for both Expanets and Blue Dot, you also computed the carrying value of those entities; is that correct?

A. Yes, sir.

Q. Does this attachment reflect the carrying value that you calculated for those entities?

A. It does.

Q. Now, in doing the impairment analysis that you performed, you recalculated the business enterprise value of Expanets and Blue Dot as of January 1st, '02; is that correct?

A. Yes.

Q. You then compared it to the carrying value of those entities that you computed as of

- ROBERT W. BERLINER -

June 30th, '02; is that correct?

A. Yes.

Q. Why would you do that?

A. Give me a minute. I think the answer to the question is -- despite the wording in the -- on Page 2-12 and 2-13 of my report, the business enterprise value of 163 million is really the value as of June 30th of 2002, based upon the January 1st, '02, American Appraisal valuation adjusted for the input data.

Q. Why, sir, would you change the valuation date? What was the basis for doing that?

A. The -- to see whether as of June 30th there was an impairment.

Q. What criteria or standard would permit one to do that?

MR. KAPLAN: Objection to the form.

A. To do what?

Q. To ignore the as-of valuation date that was actually done and create a new as-of date in order to do an impairment analysis.

Northwestern had selected January 1st, '02, as the date because that is what the effective date of 142 was; is that correct?

- ROBERT W. BERLINER -

A. The adoption date.

Q. The adoption date. I thought you had testified earlier this morning that you didn't have any problem with Northwestern's use of that date, correct?

A. That's correct.

Q. But you unilaterally did an analysis which has nothing to do with that date but has to do with a date six months later.

Is that what you did?

MR. KAPLAN: Objection to the form.

A. Yes. In order to compare it to the carrying value as of June 30th, '02.

Q. What would permit you as an auditor or anyone to unilaterally change the effective date that was adopted by Northwestern in order to determine a goodwill impairment analysis was required?

MR. KAPLAN: Objection to the form.

A. Because I employed their methodology. I didn't change their methodology.

Q. Is there anything that you can point to in any accounting standards or accounting principles that would permit that unilateral change

- ROBERT W. BERLINER -

of the date?

A. There are many occasions where there's a need to update an analysis, and this is just an updated analysis.

Q. Sir, can you tell us as an accountant -- as an expert in accounting what criteria you relied upon to ignore the valuation date that American Appraisal has used and Northwestern used to come up with an as of June 30th, 2002, appraisal date for purposes of doing a goodwill impairment analysis?

MR. KAPLAN: Objection to the form.

A. I don't think there's anything in the accounting literature that address that specific question.

Q. You just did it?

A. Yeah. There is no reason that I couldn't do it. I -- just as you update any analysis.

Q. So do I understand, sir, that if the goodwill impairment analysis was actually being performed as of -- with a validation date as of January 1st, '02, your analysis and report does not address that situation but rather addresses a situation in which the date is June 30th, '02, six

- ROBERT W. BERLINER -

months later; is that what you're telling us?

A. Yes.

MR. KAPLAN: Objection.

Q. Let's look at Attachment A2 again, if we could, please. Before we get there, just let me ask you this.

Your opinion is that the proper business valuation or business enterprise valuation for Expanets as of June 30th, '02, is $163 million; is that correct?

A. Yes.

Q. Do you have any opinion, therefore, sir, as to what the appropriate business valuation, business enterprise valuation for Expanets was as of January 1, '02?

A. No.

Q. Do you have any opinion as to what the proper business enterprise value for Blue Dots was as of January 1, '02?

A. No.

Q. Attachment A2. If you look at the entries which are below the line, it says, "carrying value as of January 1, '02," and then below that there are another series of entries.

- ROBERT W. BERLINER -

Do you see that, sir?

A. Yes.

Q. In computing the carrying value for Expanets and Blue Dot as of June 30, '02, you used a book value of debt as of September 30, '02.

Do you see that?

A. I do.

Q. Why would you use information which is as of September 30 to compute the carrying value as of June 30?

A. Because I didn't have the information as of June 30.

Q. Where did you get the information as of September 30?

A. The documents, indicating NOR 375926 for Expanets and NOR 376038 for Blue Dot.

Q. There was no documentation that you had that would have provided you with that information as of June 30, '02?

A. I didn't have any such documentation that I could find.

Q. That's the case for the equity value, as well, where you used a September 30 date to compute equity value for both Expanets and Blue Dot?

And so, I don't believe these figures could be obtained from the financial statements of the Qs.

Q. Well, if the book value of the debt for Expanets and Blue Dot differed from the book value for the debt of those entities --strike that.

If the book value of the debt of both Expanets and Blue Dot as of June 30, '02, differed from the book value of the debt of those entities as of 9/30/02, that would change the computation of the carrying value, correct.

A. Yes, sir.

Q. And that would change the goodwill impairment analysis; isn't that correct?

A. Yes.

Q. Similar -- is the same true with respect to equity value as of 9/30/02 as compared to equity value as of June 30, '02?

A. It is; the same is true.

Q. It would have a compounding effect because you have two different values that would have been computed in determining the carrying value, which come from a different quarter?

A. You mean both the debt and the equity?

Q. Correct.

- ROBERT W. BERLINER -

A. Well, that's not compounding but there would be two reasons -- two possible changes.

Q. I just want to be very clear about this.

Is there anything that you can tell us or point to which would have required Northwestern to have done a goodwill impairment analysis as of June 30, '02?

A. Yes.

Q. What's that?

A. The standard would require goodwill analyses to be done if there were triggering events since the last analysis; so that here we have a situation where there was significant adverse developments that, in my mind, would have been triggering events that would require the analysis as of June 30th of '02.

Q. Where would one find those triggering events or definition of what those triggering events would be?

A. You mean where in the literature?

Q. Yes, in the accounting standards, in the literature.

A. In the facts of the case.

Q. In the accounting standards or in the

- ROBERT W. BERLINER -

literature.

A. I believe that's discussed in 142.

Q. Did you examine 142 to determine if there was such a triggering event?

A. Well, you wouldn't be able to determine that from reading 142. You'd have to go into the facts and circumstances that existed with respect to Expanets in the year 2002.

Q. My question is; is there a specific triggering event or criteria which is listed in 142 that you used in order to justify doing a goodwill impairment analysis as of June 30, '02, as opposed to what Northwestern had selected, which is January 1, '02?

MR. KAPLAN: Objection to the form.

A. Yes. I believe the 142 describes the kinds of things that would be considered.

Q. Is there any place in your report which reflects your reliance on those criteria or standards determining that there was a triggering event?

A. I don't think I discussed that in the report.

Q. Why not?

- ROBERT W. BERLINER -

is a description of the kinds of things that would fall within triggering events.

Q. Wouldn't it be appropriate in offering an expert opinion that an alternative goodwill impairment analysis was required to have provided your analysis of the triggering event justifying the opinion?

MR. KAPLAN: Objection.

A. The report is describing my determination that there was an impairment as of June 30, '02. I didn't say anything in the report about Northwestern having done the updated analysis as of that date, but that's implied by my doing it.

Q. But is there anything in your report which points to anything in the accounting literature which even starts to suggest that Northwestern had an obligation to do what you decided to do unilaterally?

MR. KAPLAN: Objection to the form.

A. There's nothing in the report that describes that.

Q. Why did you exclude it from your report?

MR. KAPLAN: Objection to the form.

A. Because I focused on the determination

- ROBERT W. BERLINER -

of whether or not there was an impairment as of that date and it seemed pretty obvious that having concluded that there was not only an impairment but that the full amount of the goodwill should have been written off as of that date, that it was obvious to me that that suggested that Northwestern should have done the analysis as of that date.

Q. Is that reflected in your report?

A. No. I said it was obvious. I didn't bother stating it.

Q. I see. Now, if one was going to do an entirely new goodwill impairment analysis as of June 30, '02, one would need presumably to have a new independent business enterprise valuation by an independent expert, correct?

A. That would be desirable but not necessary.

Q. Let me understand because I'm a little confused, Mr. Berliner. This morning when you were testifying, you testified that you were doing your valuation -- or you were actually adjusting the valuation of American Appraisals as of January 1, '02. You were not performing -- I specifically asked you about this and pointed to you the

- ROBERT W. BERLINER -

language in your report.

And you said, "No. My valuation date is as of January 1, '02."

You took issue with what was in the valuation American Appraisals did because the projections with which they had been provided were at odds with the actual results of the company's operations in the first six months of '02.

Do you remember that testimony?

A. I took odds for reasons in addition to the six months '02.

Q. Fine. I take your point. But with that addition, is what I just said an accurate recapitulation of what you testified to this morning?

A. Yes.

Q. Now you're testifying that that's not what you did. In fact, what you did was you determined that there was some triggering event in the interim between January 1, '02, and June 30, '02, which required a completely new goodwill impairment analysis to be done as of June 30, '02.

And what you did not do is simply go back and revise a valuation which was as of January

- ROBERT W. BERLINER -

A. It's to take the impairment analysis that American Appraisal performed and update it. I don't know that I would call it an entirely new analysis.

Q. I may come back to that, but for the moment I just want to direct your attention to the last part of your report. It's on Page 5-1 of your report.

Mr. Berliner, Page 5-1, the assumption which you built into your opinions that Clark Fork remained directly liable under the QUIPS following the going flat transaction.

A. Yes.

Q. What if Clark Fork had not remained liable on the QUIPS following the going flat transaction, would your opinion have changed?

A. No. My opinion is based on a hypothetical assumption that's stated here, that such opinion would never change. It's based on that hypothetical assumption.

Q. I see. So, your assumption -- your opinion is had Northwestern -- this has to be -- I think it's not explicit but it must be implicit.

Had Northwestern transferred all of the

assets except the Milltown Dam to itself, but left liabilities, simply the QUIPS liabilities to be paid by Clark Fork, that would have rendered Clark Fork insolvent or would have put it in a position where its total liabilities exceeded its total assets.

A. Exactly.

MR. KAPLAN: Objection to the form.

Q. So it has to be both, both Northwestern had to take the assets and Northwestern had to leave that liability, correct?

A. Correct.

Q. If both of those assumptions aren't built in, of course, we're talking about a different set of facts and hypotheticals and you have no opinion; is that correct?

A. That's correct.

Q. It's a little like if my mother had wheels, she'd be a car.

MR. KAPLAN: Objection.

A. I don't know your mother.

MR. PIZZURRO: Let's take five minutes, please.

(Whereupon, there was a brief recess in